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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)**

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID ALBERTO ROMERO,

Defendant and Appellant.

C079571

(Super. Ct. No. 14F04389)

Defendant David Alberto Romero was convicted of robbery and murder. On appeal, he contends (1) the trial court improperly precluded him from presenting evidence to challenge gunshot residue evidence presented by the People; (2) his trial counsel rendered ineffective assistance by failing to seek redaction of or a limiting instruction with respect to a recording of his police interrogation to exclude hearsay and opinions in the interrogating officer's questions; (3) the trial court erred in admitting

tapes of a witness's interrogation and, if the claim is forfeited, counsel was ineffective in failing to seek redaction or a limiting instruction; (4) the order that he must pay attorney fees should be stricken either because it is not supported by substantial evidence of defendant's ability to pay or unusual circumstances meriting imposition, or because counsel was ineffective in failing to object to its imposition; (5) the parole revocation fine must be stricken; and (6) the cumulative prejudicial effect of these errors requires reversal of his convictions. We will strike the order that defendant pay attorney fees but otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The victim, Thu Lan Tran, worked for her brothers' security businesses as an office manager. The business office was located in a residential building near 28th Street and Fruitridge Road in Sacramento (hereinafter, business office). As part of her position, Tran was responsible for the companies' payroll. The employees were paid both by check and in cash. Tran carried the payroll material and cash to and from the business office daily in a black laptop bag. Tran usually withdrew several thousand dollars from the bank to cover the payroll cash requirements, generally in smaller bills. Customarily, Tran also collected two-dollar bills throughout the year to gift to relatives as part of the Vietnamese New Year celebration. Employees were paid every other week, and were able to collect their pay on Wednesday, Thursday, or Friday of the weeks in which they were paid.

On Friday, June 27, 2014, at about 7:30 a.m., James Tung brought his 1992 silver Toyota Camry to be serviced by a mechanic, Ben Lee, at a shop located across the street from the business office. Lee arrived at the shop after 8:00 a.m. and began working on another car while Tung waited for him to finish. As he waited, shortly before 9:00 a.m., Tung made a telephone call. Just before he dialed, he heard a "pop sound" coming from the direction of the business office. As he turned toward the sound, he heard a woman

scream, saw a dog run out of the business office, and then heard the door to the business office slam shut. Thinking the noises related to the door opening and closing, Tung continued with his telephone call. As he finished his call, Lee came out from the shop to take Tung's car for a test drive.

While test-driving Tung's car, Lee saw what he described as a light-skinned Black man with a red "hoodie sweater" pulled tight around his face walking quickly from the business office carrying Tran's black laptop bag. Lee returned to the shop and asked Tung whether he had seen someone in a red sweater come out of the business office, but he had not seen anyone. Concerned about Tran, Lee walked quickly across the street, entered the business office, and ran back toward the shop. Inside the business office, Lee saw Tran lying face down in a puddle of blood on the floor.

Lee jumped into Tung's car, pulled out his cell phone, called 911, and drove off looking for the man in the red hoodie. As he drove down a nearby street, he did not see anyone in a hoodie, and he saw only one car on the road—a "goldish" early 2000's Dodge or Ford Windstar van. There was one person in the van, and he or she had what looked to Lee like "an old lady perm" or Afro and was wearing a red hoodie. He decided to follow the van as it drove towards Franklin Boulevard. On the telephone with a 911 operator as he drove, Lee reported the license plate number. Lee continued to follow the van as it turned onto Franklin Boulevard, and then onto Fruitridge Road, but stopped following it as it got onto the freeway. Using the license plate number and description Lee provided them and video surveillance from various locations, police identified a 2003 tan Ford Windstar minivan registered to the mother of defendant's girlfriend, Josephina Nevotti.

Police officers arrived at the shop just after Lee returned from following the van. When police entered the business office, they found Tran lying face down, deceased, in a pool of blood. They also found a blood trail and what appeared to be a .22-caliber shell

casing. She had been hit in the face and shot in the neck from very close range. Tran's black bag was not found in the business office.

Kenneth Lomack lived on 28th Street near the business office where Tran was killed. On the morning of the incident, between 8:30 and 8:45, he was getting ready to go to work. While he was standing on the sidewalk next to his car, a man wearing a red sweatshirt and jeans walked past him toward Fruitridge Road, startling him. Lomack said, "hey" to the man, who responded "hey." In this brief encounter, the man appeared to Lomack to be Black and Vietnamese with short, dark-colored hair. When he passed Lomack, the man was not carrying anything in his hands. Shortly thereafter, after Lomack had gotten into his car and was preparing to leave, he saw the man walk past in the opposite direction. This time the man was carrying a black bag and had a sweatshirt hood pulled up around his face, masking it.

Police located the van outside Nevotti's apartment building. They observed the van overnight, and when Nevotti began to drive the van the following morning, police conducted a traffic stop. Nevotti consented to a search of the van and also of her apartment, and she volunteered that there was a lot of money in the apartment that she was holding for defendant. When police went to search the apartment, there were two people present: Emmanuel Vasquez and defendant. In the course of searching Nevotti's apartment, police found \$772 including a folded stack of two-dollar bills in the pocket of a child's jacket in a closet. In another closet, they found a shoebox with a slip of paper bearing defendant's name and a drawstring bag containing \$440 inside. Additionally, they found a live .22-caliber ammunition round. They also found \$174 and a black-and-red hooded sweatshirt in a bag. In the van, they found a single particle of gunshot residue on the gear shifter/signal indicator.

During an initial photographic lineup, Lomack was able to narrow the possibilities to two individuals, but was unable to decide without seeing them walk and wear a mask.

A live lineup was arranged for four days later. The night before the live lineup took place, Lomack saw a news report that included a photograph of the suspect–defendant. However, he informed the officer conducting the lineup that he had not looked at the photograph on the news report. During the live lineup, Lomack identified defendant as the man he had seen walking on the street.

Defendant was charged with robbery and murder in the commission of a robbery, and as to both counts, it was alleged defendant had personally discharged a firearm. A jury found defendant guilty of both counts, and sustained the firearm allegations. The trial court sentenced defendant to life in prison without the possibility of parole for the murder, with a consecutive term of 25 years to life for the firearm enhancement, and sentenced defendant to a term of five years for the robbery, with another consecutive term of 25 years to life for the firearm enhancement. The trial court stayed execution of the sentence on the robbery count and associated enhancement pursuant to Penal Code section 654.¹ Additionally, the trial court imposed a restitution fine of \$10,000 (§ 1202.4, subd. (b)) and imposed and stayed a parole revocation fine of \$10,000 (§ 1202.45).

DISCUSSION

Defendant contends the trial court erred in excluding evidence of an alternate manner in which the gunshot residue may have come to be in the van. Defendant also claims trial counsel was ineffective in failing to seek further redaction of the recordings of defendant’s police interrogation introduced as evidence or to seek a limiting instruction regarding the same. He additionally argues either the trial court erred in admitting unredacted versions of the recordings of Nevotti’s interrogation as prior inconsistent statements or trial counsel was ineffective in failing to seek redaction or a

¹ Undesignated statutory references are to the Penal Code.

limiting instruction regarding those recordings. Defendant further contends the trial court erred in ordering him to pay attorney fees or a parole revocation fine. Finally, he claims the cumulative prejudicial effect of those errors warrants reversal. We will modify the judgment to strike the order that defendant pay attorney fees but otherwise affirm the judgment.

1.0 Gunshot Residue Evidence

Defendant contends the trial court improperly prohibited him from presenting evidence that the gunshot particle residue in the vehicle came from another person, not as third party culpability evidence but as an alternative explanation for the particle's presence. Specifically, he claims the trial court excluded the evidence on an improper legal theory—third party culpability. We review a trial court's ruling admitting or excluding evidence for abuse of discretion (*People v. Chism* (2014) 58 Cal.4th 1266, 1291), reversing only if the ruling was “ ‘arbitrary, capricious or patently absurd’ ” and caused a “ ‘manifest miscarriage of justice.’ ” (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1124.) We conclude the trial court did not abuse its discretion in excluding the evidence.

Relevant evidence, that is “evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action,” is generally admissible. (Evid. Code, §§ 210, 351.) Evidence that “leads only to speculative inferences,” however, is irrelevant, and is properly excluded. (*People v. Morrison* (2004) 34 Cal.4th 698, 711.)

Here, defendant moved in limine to introduce evidence of third party culpability. Namely, he sought to prove Emmanuel Vasquez was responsible for the homicide based on evidence that he had been in possession of a “little gun” and that it had fallen out of his pants in the van the day before the robbery and murder, and that Vasquez and defendant had been together on the day of the robbery and murder. In a supplemental

brief and at the hearing on the motion, defendant also argued the evidence should be admitted as a “plausible” alternative explanation as to how the gunshot residue came to be on the van’s gear shift. Though he acknowledged there was no evidence the gun was fired in the van, he framed the argument as being “that the gun could have been fired before Mr. Vasquez had the gun, there was a transfer from his hand to the interior of the van, and that is how the gunshot residue was—I believe it was a gear shift in the van and a turn blinker.”

The trial court expressly acknowledged having read defendant’s supplemental brief but noted that there was no evidence of the gun in Vasquez’s possession having been fired at any time, or that Vasquez had driven the van, or of any transfer of gunshot residue from Vasquez. Thus, the trial court found any evidence of transfer by Vasquez as an explanation for the presence of gunshot residue in the van to be “speculative at best.” After hearing further argument, the trial court additionally explained that it was excluding evidence of Vasquez’s being in possession of a gun inside the van on the night before the homicide because it found no evidence of a link between Vasquez and the charged crimes.

Defendant’s argument that the trial court excluded the evidence based on an incorrect legal theory, i.e., as evidence of third party culpability, overlooks the context of the hearing and ruling, which called for the trial court to address defendant’s motion seeking to admit the evidence on that now challenged theory. But, and more importantly, it overlooks the trial court’s express ruling that the evidence was inadmissible to provide an alternate explanation of how the gunshot residue came to be in the van because it was “speculative at best.” Defendant does not challenge, or even address, this aspect of the trial court’s assessment, i.e., that the evidence was inadmissible because it was speculative, and we find no error in that assessment. Accordingly, we conclude the trial court did not abuse its discretion in excluding the evidence on that basis.

2.0 Defendant's Police Interrogation

In the trial court, defendant moved to exclude references to his selling of controlled substances and to other statements about his character from the transcript and recording of his police interrogation. Some statements were stricken by agreement, while others were admitted after the trial court conducted an analysis of their probative value and prejudicial effect. As a result, a redacted recording of defendant's police interrogation was played for the jury. On appeal, however, defendant contends trial counsel was ineffective by failing to seek further redaction of the recording of defendant's interrogation to remove the police officer's questions asserting the existence of facts demonstrating defendant's culpability and the officer's beliefs about defendant's character, and by failing to seek a limiting instruction regarding the same. We conclude defendant has failed to establish a claim of ineffective assistance of counsel.

To establish a claim of ineffective assistance of counsel, defendant must prove that (1) trial counsel's representation was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficiency resulted in prejudice to defendant, meaning "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." (*People v. Mai* (2013) 57 Cal.4th 986, 1009 (*Mai*); *People v. Williams* (1997) 16 Cal.4th 153, 215; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [80 L.Ed.2d 674] (*Strickland*).) If defendant makes an insufficient showing on *either* of these components, his ineffective assistance claim fails. (*People v. Holt* (1997) 15 Cal.4th 619, 703 (*Holt*); see *Strickland, supra*, at p. 687 [80 L.Ed.2d 674].)

"It is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one,

or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding.” (*Mai, supra*, 57 Cal.4th at p. 1009.) We accord trial counsel’s tactical decisions substantial deference and do not second-guess counsel’s reasonable tactical decisions. (*People v. Maldonado* (2009) 172 Cal.App.4th 89, 97.) And, as a general matter, because the failure to object to evidence usually involves a tactical decision on counsel’s part, it rarely establishes a counsel’s incompetence. (*People v. Frierson* (1979) 25 Cal.3d 142, 158; see *People v. Boyette* (2002) 29 Cal.4th 381, 433.)

Here, though the questions asked by the interrogating officer did contain assertions of fact and of a perceived lack of veracity either by defendant or other witnesses, defendant steadfastly denied all allegations and assertions of fact purportedly connecting him to the robbery and homicide. Despite persistent and rigorous questioning, defendant maintained throughout the interrogation that he had not committed the crimes. Instead, he asserted he was home and, upon further questioning, indicated he was in Nevotti’s van in the area of the crime with another woman smoking marijuana at the time of the shooting. The identity evidence in this case was not very strong, as defense counsel argued. Defense counsel also argued Nevotti was lying at various times and could not be believed. Given the fact that defendant’s statements—including his denials—were clearly admissible against him at trial, as well as defense’s strategy to undercut identity evidence and Nevotti’s credibility to raise a reasonable doubt of defendant’s guilt, it would be reasonable for defense counsel to make the tactical decision to allow the recording of defendant’s interrogation—including the accusing questions posed by officers based on supposed intelligence they had gathered and defendant’s steadfast denial to the officers’ assertions of fact connecting him to the crimes—to be admitted into evidence. On this record, defendant has not shown counsel’s tactical decision not to seek further redaction or a limiting instruction amounted to ineffective assistance.

3.0 Nevotti's Police Interrogation

At trial, Nevotti, who had married defendant since his incarceration on these charges, was awarded use immunity. She answered basic questions relating to her and defendant's identities, her job, and their address at the time of the incident but otherwise generally claimed a lack of memory in response to most questions. Indeed, she repeatedly responded, "I don't remember," to hundreds of questions posed by the People encompassing the substance of her previously recorded conversation with defendant and her interrogation with police.² As a result, the People asked the trial court to find that Nevotti was willfully not answering and that they be allowed to play a recording of Nevotti's police interrogation for the jury. Over defense counsel's general objection that Nevotti had merely "stated she doesn't remember," the trial court found Nevotti was "clearly being purposefully evasive" rendering her prior statement inconsistent. Thus, the trial court permitted the People to play the recording to show any inconsistent statements. The People then played audio and video recordings of Nevotti's conversation with defendant at the police station in an interview room and her interviews with police.

On appeal, defendant contends the trial court improperly admitted Nevotti's statements as prior inconsistent statements, or, alternatively, that trial counsel rendered ineffective assistance by failing to seek redaction of the statements to exclude irrelevant and inadmissible material and to seek a limiting instruction regarding the same. We are not persuaded.

First, "[o]rdinarily, a witness's inability to remember an event is not inconsistent with that witness's prior statement describing the event. [Citation.] When, however, 'a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is

² As pithily stated by the trial court, "I counted somewhere well over a hundred times she said 'I don't remember' from something as simple as what color her van was to very simple questions."

implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness’s “I don’t remember” statements are evasive and untruthful, admission of his or her prior statements is proper.’ ” (*People v. Rodriguez* (2014) 58 Cal.4th 587, 633.) Here, the trial court expressly found Nevotti was being “purposefully evasive,” and as we discuss in more detail, *post*, the record provides a reasonable basis for that conclusion. Accordingly, it was not error for the trial court to admit Nevotti’s prior inconsistent statements based on that finding. (Evid. Code, §§ 770, 1235.)

Second, to the extent defendant claims on appeal his challenge to the admission of specific portions of those recordings was preserved by trial counsel’s general objection to the trial court’s finding that Nevotti’s testimony as a whole was inconsistent with her prior statements, we reject that claim. By failing to inform the court of specific reasons for exclusion of portions of the tape, i.e., the now asserted contentions of inadmissible hearsay and improper opinion, defendant has forfeited this challenge. (See *People v. Riccardi* (2012) 54 Cal.4th 758, 802 [“ ‘A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct.’ ”].)

Finally, defendant has failed to demonstrate trial counsel rendered ineffective assistance by failing to object to the admission of specific portions of the recordings. As stated above, to prevail on a claim of ineffective assistance of counsel, defendant must show both that trial counsel’s representation was deficient because it fell below an objective standard of reasonableness under prevailing professional norms and that the deficiency resulted in prejudice to defendant. (*Mai, supra*, 57 Cal.4th at p. 1009; see *Strickland, supra*, 466 U.S. at pp. 687-688 [80 L.Ed.2d 674].) “Counsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile.” (*People v. Price* (1991) 1 Cal.4th 324, 387.) Neither is it “incumbent upon trial counsel to advance meritless arguments or undertake useless

procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel.” (*People v. Constancio* (1974) 42 Cal.App.3d 533, 546.)

Here, the breadth of questions posed to Nevotti which she declined to answer for lack of memory suggested strongly that she would not answer questions on any subject, even innocuous subjects. For instance, she did not remember who she was living with when defendant was arrested; did not remember if defendant was working at the time; did not remember whether she lied to officers at the time; did not remember the color or make of the van; did not remember speaking with officers; did not remember speaking with defendant at the police station; did not remember whether she had a cell phone at the time or her current cell phone number; did not remember whether the day defendant was arrested was important or whether she was upset by his arrest; and did not remember the last time she had seen or spoken to defendant. The People asked Nevotti hundreds of questions, covering approximately 40 pages of transcript, and spanning the vast majority of topics covered in the course of her interrogations and her recorded conversation with defendant. While she did answer some questions, she declined to answer most questions due to a purported lack of memory.

Counsel could reasonably determine it would be futile to object to admission of select portions of the recordings as they had not been covered in the People’s initial examination because the People had, at that time, not yet finished their examination and could undoubtedly ask her questions on those topics and she would answer that she did not remember. Alternatively, by objecting, counsel may have drawn additional attention to the evidence the People sought to admit, making his decision to allow the complete recordings to be played a tactical one, which we have no cause to second-guess. Accordingly, we conclude defendant has failed to show counsel rendered ineffective assistance by failing to object to the admission of or to seek redaction or a limiting

instruction regarding the recordings of Nevotti's interrogation or her conversation with defendant.

4.0 Attorney Fees

Defendant contends the trial court improperly imposed attorney fees in the amount of \$3,175, and that the order must be stricken. The People agree the order was in error, but argue that the matter should be remanded to determine defendant's ability to pay attorney fees. We strike the order as improper in light of the statutory presumption against defendant's ability to pay and the trial court's express finding that defendant lacked the ability to pay.

"In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, . . . the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof." (§ 987.8, subd. (b).) However, it is statutorily presumed that "[u]nless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense." (*Id.*, subd. (g)(2)(B).)

Here, the trial court did not find unusual circumstances to overcome the statutory presumption that defendant lacked the ability to pay attorney fees. Rather, in imposing attorney fees, the trial court stated that "it appears that the defendant does not have the ability to pay." It further made the finding that he does not have the ability to pay. Therefore, we conclude remand for the trial court to conduct a hearing regarding

defendant's ability to pay is unnecessary, and we strike the trial court's order imposing attorney fees.³

5.0 Parole Revocation Fine

Defendant contends the trial court improperly imposed the parole revocation fine of \$10,000 because he is not eligible for parole. The People improvidently concede the issue. Section 1202.45, subdivision (a) provides that “[i]n every case where a person is convicted of a crime and his or her sentence includes a period of parole, the court shall . . . assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4.” Here, defendant was sentenced to a determinate term with respect to his robbery conviction. That sentence, though stayed pursuant to section 654, was imposed and does include a period of parole. (See *People v. Duff* (2010) 50 Cal.4th 787, 796 [a sentence stayed pursuant to § 654 is imposed but its execution is stayed with the stay only becoming permanent on completion of the unstayed sentence].) Accordingly, it was not error for the trial court to impose the \$10,000 parole revocation fine, which will become payable only if defendant actually begins serving a period of parole and that parole is revoked. (See *People v. Brasure* (2008) 42 Cal.4th 1037, 1075 [holding parole revocation fine appropriate where the defendant is sentenced to both determinate and indeterminate term, though period of parole is unlikely to ever be served, because determinate sentence includes period of parole].)

6.0 Cumulative Prejudice

Defendant contends the cumulative prejudicial effect of the errors by the trial court and trial counsel deprived him of a fair trial and reliable jury verdict warranting reversal

³ We note the court's oral pronouncement of the order to pay attorney fees was never reduced to a written order nor does it appear on the abstract of judgment. Thus, no amendment to the abstract is necessary.

of his conviction. “In theory, the aggregate prejudice from several different errors occurring at trial could require reversal even if no single error was prejudicial by itself. ‘[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.’ ” (*In re Reno* (2012) 55 Cal.4th 428, 483.) However, when, as here, claims have been rejected on their substantive merits—i.e., no legal error found—the claims cannot logically be used to support a cumulative error claim because there was no error to cumulate. (See *ibid.*)

DISPOSITION

The judgment is modified to strike the order that defendant pay attorney fees. As modified, the judgment is affirmed.

BUTZ, Acting P. J.

We concur:

DUARTE, J.

MURRAY, J.